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In The

Supreme Court of the United States

October Term, 1996

JOHN REINHARD III, JOHN REINHARD, and ELLEN REINHARD,

Petitioners,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TOUW; SUE BAKER; LaVONDA BURNETTE; MARY BUSHNELL; JUDITH ORTIZ; MARK ROYSTER; RUTH ROYSTER; and NEIL G. PEDERSEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Do parents have a fundamental right under substantive due process to exempt their child(ren) who attend public school from State and/or local educational requirements with which the parents disagree on secular, value-based grounds?

(2) Is a public school student's decision over when to perform community service so "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), that it qualifies as one of the limited set of core personal decisions recognized under the doctrine of substantive due process as fundamental?

PARTIES TO THE PROCEEDINGS

With respect to the parties named in the caption, Respondents state that Respondent, The Chapel Hill-Carrboro City Board of Education, is a public body and body politic and corporate created and existing under the General Statutes of North Carolina and has general control and supervision of all matters pertaining to the public schools in its respective local school administrative unit, (district), The Chapel Hill-Carrboro City Schools, for and on behalf of the State of North Carolina. Pursuant to Supreme Court Rule 29.6, The Chapel Hill-Carrboro City Board of Education affirmatively states that (1) it is not a publicly held corporation or other publicly held entity; (2) it is not a parent, subsidiary or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity; and (3) there are no other publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation. Respondents Ken Touw, Sue Baker, LaVonda Burnette, Mary Bushnell, Judith Ortiz, Mark Royster and Ruth Royster, were and are sued in their official capacities as the duly elected members of The Chapel Hill-Carrboro City Board of Education at the time of the adoption of the Service Learning Program, which is the subject matter of this action. The present duly elected members of The Chapel Hill-Carrboro City Board of Education are Mary Bushnell, Elizabeth Carter, Nicholas Didow, Harvey Goldstein, Bea Hughes-Werner, Mark Royster and Ken Touw. Respondent Neil G. Pedersen was and is sued in his official capacity as the duly appointed

PARTIES TO THE PROCEEDINGS – Continued

Superintendent of The Chapel Hill-Carrboro City Schools. Dr. Pedersen continues to serve in this office.

Further, Respondents acknowledge that Aric Herndon and his parents, Christiana and John Herndon, were plaintiffs in the original proceedings in the district court and on appeal to the Fourth Circuit. Upon information and belief, the Herndon family has subsequently moved outside of the local school administrative unit, (district), of The Chapel Hill-Carrboro City Schools for reasons unrelated to this litigation and as a result, Aric Herndon is no longer subject to the requirements of the Service Learning Program instituted by The Chapel Hill-Carrboro City Board of Education and the subject matter of this actior..

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. Statement of the Facts 2

B. Proceedings Below 5

REASONS FOR DENYING PETITION 6

I. PETITIONER PARENTS HAVE NO FUNDAMENTAL RIGHT TO EXEMPT THEIR CHILD FROM EDUCATIONAL REQUIREMENTS TO WHICH THEY OBJECT ON SECULAR GROUNDS 7

A. The proper standard of review for secular, values-based parental challenge is rational basis review 8

B. The Service Learning Program easily passes muster under rational basis review 18

II. STUDENTS' LIBERTY INTEREST DO NOT RENDER THE SERVICE LEARNING PROGRAM UNCONSTITUTIONAL 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Alfonso v. Fernandez, 606 N.Y.S. 2d 259 (1993), *appeal dismissed without op.*, 614 N.Y.S. 2d 388 (1994) 15, 16

Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) 10, 18

Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975) 13

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 10

Board of Educ. v. Rowley 458 U.S. 176 (1982) 9

Bowers v. Hardwick, 478 U.S. 186 (1985) 7

Brown v. Board of Educ., 347 U.S. 483 (1954) 11, 18

Butler v. Perry, 240 U.S. 328 (1916) 20

Care and Protection of Charles, 504 N.E.2d 592 (Mass. 1987) 11, 15

Clonlara, Inc. v. Runkel, 722 F. Supp. 1442 (E.D. Mich. 1989) 11, 13

Collins v. City of Harker Heights, ___ U.S. ___, 112 S.Ct. 1061 (1992) 7, 17

Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd* 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970) 10

Curtis v. School Committee of Falmouth, 652 N.E. 2d 580 (1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 753 (1996) 15, 16

Cross v. Trustee Walton Graded Sch., 110 S.W. 346 (1908) 16

TABLE OF AUTHORITIES – Continued

Page

Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995) 20

Ferrier v. Tyler, 48 Vy. 444 (1876) 17

Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973) 11

Griswold v. Connecticut, 381 U.S. 479 (1965) 15

Hazelwood Sch. Dist. v. Kuhlmeirer, 484 U.S. 260 (1988) 9

Herndon v. Chapel Hill-Carrboro City Board of Educ., 899 F. Supp. 1443 (M.D.N.C. 1995), *aff'd* 89 F.3d 174 (4th Cir. 1996) 5, 7, 8, 19

Hodel v. Indiana, 452 U.S. 314 (1981) 18

Immediato v. Rye Neck Sch. Dist., 873 F. Supp. 846 (S.D.N.Y 1995); *aff'd* 73 F.3d 454 (2nd Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 60 (1996) 6, 11, 17

Jordan by Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) 14, 16

Kidder v. Chellis, 59 N.H. 473 (1879) 16

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 6

McCollum v. Board of Educ., 333 U.S. 203 (1948) 18

Meyer v. Nebraska, 262 U.S. 390 (1923) 12, 13, 14, 18

Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) 11, 12, 13

Null v. Board of Educ., 815 F. Supp. 937 (S.D. W. Va. 1993) 11

Palko v. Connecticut, 302 U.S. 319 (1937), *overruled on other grounds, Benton v. Maryland*, 395 U.S. 784 (1969) 17

TABLE OF AUTHORITIES – Continued

Page

Pierce v. Society of Sisters, 268 U.S. 510 (1925) ... 12, 13, 14

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 7, 19

Reno v. Flores, ___ U.S. ___, 113 S.Ct. 1439 (1993) ..8, 16

Roe v. Wade, 410 U.S. 113 (1973) 15

Runyon v. McCrary, 427 U.S. 160 (1976).....9, 15

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 8, 9

Sewell v. Board of Educ. of Defiance Union Sch., 29 Ohio St. 89 (1876) 17

State v. DeLaBruere, 577 A.2d 254 (Vt. 1990) 12

State ex rel. Andrew v. Webber, 8 N.E. 708 (1886)..... 16

State v. Mizner, 50 Iowa 145 (1878)..... 16

State v. Shaver, 294 N.W.2d 883 (N.D. 1980) 11

Steirer v. Bethlehem Area Sch. Dist., Steirer v. Bethlehem Area Sch. Dist., 789 F. Supp. 1337 (E.D. Pa. 1992), *aff'd* 987 F.2d 989 (3rd Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 85 (1993) 6

Vernonia Sch. Dist. 47J v. Action, ___ U.S. ___, 115 S.Ct. 2386 (1995)..... 20

Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995) 20

Ware v. Estes, 328 F. Supp. 657 (N.D. Texas 1971) 11

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 9, 10, 14, 15

Whalen v. Roe, 429 U.S. 589 (1977)..... 19

Wood v. Strickland, 420 U.S. 308 (1975) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. XIV, § 1 1

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2

MISCELLANEOUS

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162-73, 1181-95 (1991) 19

Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 29 U.C. Davis. L. Rev. 1169 (1995) 19

C. Beard & M. Beard, *New Basic History of the United States* (1968) 10

Judith A. Boss, *The Effects of Community Service Work on the Moral Development of College Ethics Students*, 23 J. Moral Educ. 183 (1994) 5

Daniel Conrad & Diane Hedin, *High School Community Service: A Review of Research and Programs* (1989) 4

Dwight Giles, Jr. & Janet Eyler, *The Impact of a College Community Service Laboratory on Students' Personal, Social and Cognitive Outcomes*, 17 J. Adolenscence 327 (1994) 4

Stephen F. Hamilton & R. Shephard Zeldin, *Learning Civics in the Community* 17 Curriculum Inquiry 407 (1987) 5

Charles Harrison, *A Carnegie Foundation Special Report: Student Service* (1987) 4

TABLE OF AUTHORITIES – Continued

Page

Jane Maland & Thomas H. Berkas, *Excellence in Action: The Community Service-Learning Program* (1993) 4

Fred M. Newman & Robert A. Rutter, *The Effects of High School Community Service Programs on Students' Social Development* (1983) 4

John E. Novak & Ronald D. Rotunda, *Constitutional Law* § 11.4 (4th ed. 1991) 8

Robert Shumer, *Community-based Learning: Humanizing Education*, 17 J. Adolescence 357 (1994) 4

Robert Shumer, *A Report from the Field: Teachers Talk About Service Learning* (1994) 4

Kathy D. Tuck, *An Evaluation of the Community Service Initiative (Pilot Project in the D.C. Public Schools)* (1992) 4

Miranda Yates & James Youniss, *A Developmental Perspective on Community Service in Adolescence* 4

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 89 F.3d 174 (4th Cir. 1996), and is reprinted in the Petitioners' Appendix. Pet. Writ A-1-17. The opinion of the United States District Court for the Middle District of North Carolina is reported at 899 F. Supp. 1443 (M.D.N.C. 1995), and is reprinted in the Petitioners' Appendix. Pet. Writ A-20-51.

JURISDICTION

Petitioners ask the Court to exercise its discretionary power to reverse the decision of the United States Court of Appeals for the Fourth Circuit entered July 11, 1996 in the case of *Aric Herndon, et al. v. Chapel Hill-Carrboro City Board of Education* reported at 89 F.3d 174 (4th Cir. 1996) and reprinted in the Petitioners' Appendix. Pet. Writ A-1-17, pursuant to 28 U.S.C. § 1254(1). While the Court has the power to grant discretionary review, for the reasons set forth in this Brief in Opposition, the Court should not exercise that discretion in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amendment XIV

SECTION 1. . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Parents, students, teachers and national, state and local officials throughout our nation are continuously debating how to best teach and provide young people with the qualities necessary for good citizenship, successful learning and favorable employment. The duly elected members of the Chapel Hill-Carrboro City Board of Education have decided that "service learning", an experienced-based program in which students select a community service project, go out into the community to perform the service, and reflect on and write about the activity once it is complete, (the "Service Learning Program") is one effective way to achieve these goals. Many other school districts, including those in the City of Atlanta and throughout the entire State of Maryland, have adopted similar service learning requirements.

The facts of this case are not in dispute. *See Joint Stipulations of Material Facts* Pet. Writ A-58-73. The Service

Learning Program is a graduation curriculum requirement for students attending Chapel Hill High School ("CHHS") and, now, East Chapel Hill High School ("ECHHS")[1]. The Service Learning Program provides students with a three-stage program designed to teach them qualities important to citizenship, learning and employment. First, students select and help plan their service project, including setting their own work schedule and arranging for their own transportation. Through these activities, students learn to assess the issues facing their community and to develop a strategy for addressing them.

Second, students spend 50 hours over their four years of high school (or an average of just over one hour per month) performing a service learning project. In performing service, students learn that they can make a difference in addressing community issues. Respondents contend that engagement in these real-world tasks further allows students to develop a wider range of personal, intellectual, academic and social skills, that will help them become effective citizens, students, leaders, colleagues and employees.

Third, students reflect on and write about the service they have performed. Students choose their own discussion topic and can convey positive or negative thoughts about their service experience. Reflection and writing

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[1] The Chapel Hill-Carrboro City Board of Education opened at new, additional high school, East Chapel Hill High School in the fall of 1996. The students attending ECHHS are subject to the same graduation requirements of the Service Learning Program as are their counterparts attending CHHS.

both sharpens students' critical thinking and writing skills and enhances their awareness of the service they have performed.

Research has substantiated service learning's effectiveness in achieving these educational goals. Briefly stated, the research demonstrates that service learning: (1) improves academic performance and engagement in learning; (2) increases ability to solve complex problems in real-world situations; (3) improves communication, cooperation, leadership, organization and other skills necessary for successful citizenship and employment; (4) increases self-esteem; (5) increases personal and civic responsibility; (6) decreases anti-social behaviors; and (7) exposes students to different vocations. These qualities are essential to responsible citizenship, successful learning and to workplace success. *See generally*, Daniel Conrad & Diane Hedin, *High School Community Service: A Review of Research and Programs* (1989); Robert Shumer, *Community-based Learning: Humanizing Education*, 17 J. Adolescence 357 (1994); Robert Shumer, *A Report from the Field: Teachers Talk About Service Learning* (1994); Charles Harrison, *A Carnegie Foundation Special Report: Student Service* (1987); Fred M. Newman & Robert A. Rutter, *The Effects of High School Community Service Programs on Students' Social Development* (1983); Kathy D. Tuck, *An Evaluation of the Community Service Initiative (Pilot Project in the D.C. Public Schools)* (1992); Jane Maland & Thomas H. Berkas, *Excellence in Action: The Community Service-Learning Program* (1993); Miranda Yates & James Youniss, *A Developmental Perspective on Community Service in Adolescence*; Dwight Giles, Jr. & Janet Eyler, *The Impact of a College Community Service Laboratory on Students' Personal,*

Social and Cognitive Outcomes, 17 J. Adolenscence 327 (1994); Stephen F. Hamilton & R. Shephard Zeldin, *Learning Civics in the Community*, 17 Curriculum Inquiry 407 (1987); and Judith A. Boss, *The Effects of Community Service Work on the Moral Development of College Ethics Students*, 23 J. Moral Educ. 183 (1994).

Petitioners, John Reinhard III, and his parents, John Reinhard and Ellen Reinhard, (the "Petitioners") ask the courts to interfere with the management of the schools by striking down this curricular requirement. Petitioners allege that the Service Learning Program violates: (1) parents' substantive due process rights to control the upbringing of their child(ren); and (2) students' substantive due process liberty rights.[2] Petitioners dispute is based upon secular, value-based grounds and they concede " 'the basic legitimacy' of the Respondents' interest in teaching students the value of service, and that the service requirement is rationally related to that interest." *Herndon v. Chapel Hill-Carrboro City Board of Educ.*, 899 F. Supp. 1443 (M.D.N.C. 1995), *aff'd* 89 F.3d 174, ___ (4th Cir. 1996). *See* Pet. Writ A-11.

B. Proceedings Below

Respondents accept the statements of the Petitioners in their Writ for Certiorari regarding the proceedings below. Pet. Writ 5-6.

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[2] While Petitioners also raised a student privacy claim before the District Court and a Thirteenth Amendment claim before the District Court and the Fourth Circuit, they have limited their Petition to Fourteenth Amendment parental and personal liberty guarantee claims. Pet. Writ p. 5, n. 8.

REASONS FOR DENYING THE PETITION

"The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes; first, to secure uniformity of decisions between and among those courts, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

There is no split of authority, nor striking deviation from the acceptable and usual course of judicial proceedings, nor any confusion about the application of the law upon which to call the Court's supervisory power into play. In actuality, Petitioners are using this opportunity to ask the Court to set a new standard of judicial review where questions of parental rights to direct the education of their child(ren) enrolled in public schools and student liberty claims are concerned. But, Petitioners have advanced no legal basis or precedent for the establishment of the fundamental right of parents or students under the Constitution to opt out of a public school educational curriculum requirement for graduation for purely secular reasons. Further, the decision which Petitioners ask the Court to review is entirely in accord with the two other reported decisions involving public school community service graduation requirements. *See Steirer v. Bethlehem Area Sch. Dist.*, 789 F. Supp. 1337 (E.D. Pa. 1992), *aff'd* 987 F.2d 989 (3rd Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 85 (1993) (rejecting First and Thirteenth Amendment challenges); *Immediato v. Rye Neck Sch. Dist.*, 873 F. Supp. 846 (S.D.N.Y 1995); *aff'd* 73 F.3d 454 (2nd Circuit), *cert. denied*, ___ U.S. ___, 117 S.Ct. 60 (1996)

(rejecting parental rights, student liberty, student privacy and Thirteenth Amendment challenges).

In the cases at bar, the District Court denied all of Petitioners' claims, and the Fourth Circuit affirmed that decision. *Herndon v. Chapel Hill-Carrboro City Board of Educ.*, 899 F. Supp. 1443 (M.D.N.C. 1995), *aff'd* 89 F.3d 174 (4th Cir. 1996) (rejecting parental rights, student liberty, student privacy and Thirteenth Amendment challenges).

For these reasons and those set forth below, the Court should deny the Petition for a Writ of Certiorari in this case.

I. PETITIONER PARENTS HAVE NO FUNDAMENTAL RIGHT TO EXEMPT THEIR CHILD FROM EDUCATIONAL REQUIREMENTS TO WHICH THEY OBJECT ON SECULAR GROUNDS.

Petitioners advance their parental rights claim under the doctrine of substantive due process. The Court recently stated that "guideposts for responsible decision-making in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S. Ct. 1061, 1068 (1992) (citation omitted). *See Bowers v. Hardwick*, 478 U.S. 186, 194-98 (1986) and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

This caution manifests itself in the standard of review. Courts distinguish between "fundamental" rights and all other substantive due process rights. Where the

State policy interferes with a "fundamental" right, courts will uphold the policy only if it is narrowly tailored to serve a "compelling state interest." *See Reno v. Flores*, ___ U.S. ___, 113 S. Ct. 1439, 1447 (1993). *See San Antonio Indep. Sch. Dist. v. Rodriquez*, 411 U.S. 1, 27-40 (1973). With respect to all other, non-fundamental rights, however, the courts will uphold the policy so long as it "meet[s] the (unexacting) standard of rationally advancing some legitimate governmental purpose." *See Reno*, 113 S. Ct. at 1449; *See generally*, John E. Novak & Ronald D. Rotunda, *Constitutional Law* § 11.4 at 374 (4th ed. 1991). This "rational basis review" standard is grounded in the judiciary's deference to the legislative branches and its respect for our democratic system.

A. The proper standard of review for secular, values-based parental challenges is rational basis review

The District Court held that "the right of individual parents to exert pre-emptive control over the curriculum of public schools is not a 'fundamental' one subject to 'strict scrutiny' " *Herndon*, 899 F. Supp. at 1450; *See* Pet. Writ A-34 and that rational basis review applies to the parental rights claim. *Id.* at 1452; *See* Pet. Writ A-38. The lower court further held that the service learning requirement is rationally related to the legitimate state interest of educating students enrolled in public schools and in preparing them for participation in society as citizens. *Id.* at 1453; Pet. Writ A-40.

It is well settled that the running of public schools is a matter for the state and local officials to which the

judiciary has traditionally deferred. *See e.g. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *Wood v. Stickland*, 420 U.S. 308, 326 (1975); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). However, in the instant case, Petitioners ask the Court to declare as "fundamental" parental rights to exempt their child(ren) from educational requirements with which they philosophically disagree. The right asserted is the right of individual parent to exert pre-emptive control over the curriculum of public schools based upon wholly secular objections to that curriculum.

Courts have long recognized that an educated citizenry is of great importance to a democratic society, and that the State therefore has a strong interest in the education of its citizens. The Court has held that "[p]roviding public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

Given this important State interest in education, courts have never recognized a fundamental right of parents to exempt their child from educational requirements to which they object on secular grounds. Instead, the Court has consistently reviewed secular parental challenges to State educational requirements under the rational basis standard that the lower court correctly applied in this case. In *Runyon v. McCrary*, the Court explained that it "has repeatedly stressed that . . . [parents] have no constitutional right to provide their children with . . . education unfettered by *reasonable* government regulation." *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (emphasis added). *Wisconsin v. Yoder* stated that "[t]here is no doubt as to the power of a State, having a high responsibility for

education of its citizens, to impose *reasonable* regulations for the control and duration of basic education". *Yoder*, 406 U.S. at 213 (emphasis added).

Courts have consistently applied rational basis review to parental "values-based" challenges to school policy. In *Wisconsin v. Yoder*, for example, the Court made absolutely clear that its application of heightened scrutiny applied only "when the interests of parenthood are combined with a free exercise claim," and did *not* apply to parental objections based on secular values. *Yoder*, 406 U.S. at 233. *Yoder* thus established that "[a] way of life, however virtuous and admirable, may not be interpreted as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Yoder*, 406 U.S. at 215; *see also Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd* 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970) (affirming district court's application of rational basis review to parents' secular objections to state sex education curriculum).

The teaching of "values" is not alien to the mission of the public schools. To the contrary, the Court has recognized that:

> [p]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensible to the practice of self-government in the community and the nation.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, *New Basic History of the United States*, 228 (1968)); *accord Ambach v. Norwick*, 441

U.S. 68, 76 (1978); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In *Immediato v. Rye Neck School Dist.*, parents challenged a service learning requirement in all material respect identical to the present one. The Southern District of New York correctly held that "no federal caselaw . . . recognizes a protected parental right for students to opt out of an educational curriculum for purely secular reasons." *Immediato v. Rye Neck School Dist.*, 873 F. Supp. 846, 852 (S.D.N.Y. 1995). The lower court applied rational basis review and upheld the service learning requirement.

Many other courts have similarly refused to recognize a "fundamental" right of parents to exempt their child from educational requirements to which they object on secular grounds, and have applied rational basis review to such claims. *See e.g., Murphy v. Arkansas*, 852 F. 2d 1039 (8th Cir. 1988); *Null v. Board of Educ.*, 815 F. Supp. 937, 939 (S.D. W. Va. 1993); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1455-58 (E.D. Mich. 1989); *Gonyaw v. Gray*, 361 F. Supp. 366, 369 (D. Vt. 1973); *Ware v. Estes*, 328 F. Supp. 657, 658-59 (N.D. Texas 1971); *Care and Protection of Charles*, 504 N.E.2d 592, 600 (Mass. 1987); *State v. Shaver*, 294 N.W.2d 883, 889 (N.D. 1980).

In a decision upholding the Arkansas Home School Act against parental challenge, the Eighth Circuit summed up this body of caselaw:

> we find no persuasive argument advanced that there is a fundamental right of parents to supervise their children's educatior . . . The recognition of such a right would fly directly in the face

> of those cases in which the Supreme Court has recognized the broad power of the state to compel school attendance and regulate curriculum.

Murphy, 852 F.2d at 1043;[3] *see also State v. DeLaBruere*, 577 A.2d 254, 274 (Vt. 1990) ("all courts that have confronted defendants' argument here have rejected it and held that the parents' rights must give way to reasonable state regulation").

In the face of compelling authority, Petitioners incredibly maintain that there is ambiguity in the law regarding parents' rights to exempt their child from the school curricular requirements to which they object on secular grounds.

Petitioners argue, first, that the Court's decisions from the early part of this century, *Pierce v. Society of Sisters*, 267 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), support a higher standard of review. In *Pierce*, a private school challenged an Oregon statute requiring children between the ages of eight and sixteen to attend public school and making it a misdemeanor for parents to send their child to private school. *Pierce*, 268 U.S. at

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[3] The Court in *Murphy*, addressed this point in the context of considering plaintiffs' equal protection claim. *Murphy v. Arkansas*, 852 F.2d 1039, 1043-44 (8th Cir. 1988). The issue of whether parents' right to control the upbringing of their children is "fundamental," however, remains the same whether raised in the context of equal protection or of privacy. The *Murphy* court, in next considerating the parents' privacy claim, accordingly applied rational basis review to this claim as well. *Id.* at 1044. Because the standard of review is the same under either of these claims, *Murphy* is applicable to the parental claims currently before the Court.

530-33. In *Meyer*, a private school teacher challenged a Nebraska law making it a misdemeanor to teach any language other than English to students below the eighth grade. *Meyer*, 262 U.S. at 396-97.

While the Court struck down both statutes under the Due Process Clause, it did so because these statutes had "no reasonable relation to some purpose within the competency of the State." *Pierce*, 268 U.S. at 535, *see also Meyer*, 262 U.S. at 403 ("the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State"). The Court thus applied "rational basis review". Accordingly, both *Pierce* and *Meyer* support the lower court's holding that rational basis review is the property standard in this case.[4] Courts have consistently interpreted these cases in this way. *See Baker v. Owen*, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (*Meyer* and *Pierce* apply rational basis review and do not establish a fundamental right); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456 (E.D. Mich. 1989) (*Pierce* and *Meyer* employ a reasonableness standard, not strict scrutiny).

Even if *Pierce* and *Meyer* supported Petitioners' chosen standard of review (and they do not), the question addressed in those cases is distinguished from the instant case. In both *Pierce* and *Meyer* what troubled the Court was that the policies at issue pre-empted the entire field of education, both public and private, and thereby robbed

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[4] Further, *Pierce* states that there is "[n]o question . . . concerning the power of the State reasonably to regulate all schools . . . [and] to require . . . that certain studies plainly essential to good citizenship must be taught." *Pierce*, 268 U.S. at 534.

parents of all choice. Both decisions explicitly recognized that the policies would be constitutional if limited to the public school context and acknowledged the State's "power to prescribe a curriculum for institutions which it supports". *See Meyer*, 262 U.S. at 402; *Pierce*, 268 U.S. at 535. The Court has accordingly held that *Pierce*

> lent 'no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society' but rather 'held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools.'

Runyon 427 U.S. at 177 (quoting *Yoder*, 406 U.S. at 239 (White, J., concurring)). *Pierce* and *Meyer* do not require this Court to strike down the Service Learning Program requirement which applies only to public schools.

The other cases that Petitioners rely on do not concern school curriculum at all. For example, the decision in *Jordan by Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994), concerns a parental challenge to the State's removal of their child from the home for three days without allowing the parents access to him nor allowing judicial review of the action. *Id.* at 336-37. Respondents do not dispute that parents have a fundamental right to "retain custody over" their child(ren), as held in *Jordan*, *Id.* at 342, and that the State cannot take a child out of the home without showing something more that a "rational basis." But it does not follow that the State must justify its public school curricular choices on a "compelling interest" standard where these policies do not impact on the parents'

"custody" of their child. The proper standard for this case, as the courts have consistently held is rational basis review.[5]

Petitioners' reliance on *Alfonso v. Fernandez*, 606 N.Y.S. 2d 259 (N.Y. App. Div. 1993) and on *dicta* in *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995), is similarly misplaced. The parents in these cases challenged school condom distribution policies, not aspects of the educational curriculum. *See Id.* at 583; *Alfonso*, 606 N.Y.S. 2d at 261. These cases do not address the right asserted in this case, i.e. the right to exempt one's child from curricular requirements to which the parents disagree on secular grounds, but rather a "parenting right . . . to influence and guide the sexual activity of their children without State interference." *Alfonso*, 606 N.Y.S. 2d at 266. Even if this right were "fundamental" (and Respondents do not concede this), it would not be implicated by the present case which manifestly does not involve children's sexual activity.[6]

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[5] In contrast to *Runyon* and *Yoder, supra*, which directly address the question of secular parental objections to the school curriculum, the Court dicta cited by Petitioners - language from cases such as *Griswold v. Connecticut* or *Roe v. Wade* - do not even touch on this point. *See* Pet. Writ p. 14. Thus, the controlling cases here are plainly *Runyon* and *Yoder, supra*.

[6] *Curtis* makes clear that educational policies, in contrast to policies implicating children's sexual activity, are "unquestionably entrusted to the control, management and discretion of State and local school committees." *Curtis* 652 N.E. 2d at 584. This is consistent with the Massachusetts Supreme Court's own decision in *Care and Protection of Charles*, 504 N.E.2d 592 (Mass. 1987) in which that Court applied rational basis review to parental challenges to State curricular decisions. The

The Court has recently instructed that " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right." *Reno v. Flores*, ___ U.S. ___, 113 S. Ct. 1439, 1447 (1993). The right asserted in this case is not a parental right to the "custody" of their child, as was the case in *Jordan*, nor even a right to guide the sexual activity of their child, as was the case in *Alfonso* or *Curtis*. Rather, the lower court properly described in the right asserted in this case as "the right of individual parents to exert pre-emptive control over the curriculum of public schools" based upon wholly secular objections to that curriculum. Controlling authorities make clear that this right is not fundamental.

Plaintiffs maintain that the common law recognized a parental right to exempt their child from curricular requirements on secular, values-based grounds, and that this is sufficient to deem the right "fundamental." Many common law decisions, however, *uphold* the action of the local school authority against parental "values" claims under a reasonableness test.[7] Even if the common law did

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Curtis court cites *Charles* with approval. *Curtis*, 652 N.E.2d at 585 n. 8.

[7] *See, e.g., Cross v. Trustee Walton Graded Sch.*, 110 S.W. 346 (1908) (student's suspension for refusal, supported by parents, to participate in play was proper and within school's authority to prescribe and enforce rules for control and management of the school); *State ex rel. Andrew v. Webber*, 8 N.E. 708 (1886) (upholding expulsion of student who, at direction of father, refused to participate in required music course); *Kidder v. Chellis*, 59 N.H. 473 (1879) (rejecting parents' and students' claim they had right to exclude student from "declaiming" in school and upholding teacher's right to expel student for failure to conform to declamation rule); *State v. Mizner*, 50 Iowa 145

support Plaintiffs' view (it does not), this is not sufficient to show that a right is "implicit in the concept of ordered liberty" and, hence, "fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

One reason that courts have resisted applying this higher standard is because it would subject virtually the entire school curriculum to constitutional attack. Almost every course or school activity communicate some value or another. For example, parents who do not value competitiveness might wish to have their child exempted from gym class. Others might object to school curricula that seek to include non-Western writers or history. "Parents may have 'value' based secular objections to many subjects, such as sociology, literature, or biology and will be tempted to seek intervention by the federal courts to have their children exempted from various classes, exercises, examinations and activities." *Immediato*, 873 F. Supp. at 852. In short, under Plaintiffs' theory the courts would become enmeshed with many components of the curriculum. This is the very evil that the Supreme Court has counseled against in urging courts to employ "self-restraint" in the area of substantive due process. *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992); *See also*

(1878) (Teacher authorized to expel student who refused to study algebra pursuant to parents' instructions); *Sewell v. Board of Educ. of Defiance Union Sch.*, 29 Ohio St. 89, 91-92 (1876) (upholding suspension of student due to student's refusal to participate in rhetoric class); *Ferrier v. Tyler*, 48 Vt. 444 (1876) (school board's power to determine curriculum and compel attendance overrides parent's power to determine what subjects children will study).

McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J.) ("[n]othing but educational confusion and discrediting of the public school system can result from subjecting it to constant law suits").

B. The service learning program easily passes muster under rational basis review

Under rational basis review, petitioners bear a "heavy burden," *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981), to show that the program bears no "reasonable relation to some purpose within the competency of the State to effect." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Petitioners have not met this burden here. The central purpose of public schools is to instill the qualities necessary for successful citizenship and employment. *See, e.g., Ambach*, 441 U.S. at 76; *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); As the lower court found, it is reasonable to conclude that service learning teaches students "academic and social skills – such as teamwork, problem solving, negotiation, communication, planning and evaluation – that will help them become effective employees, colleagues, citizens and leaders." The Service Learning Program accordingly passes the rational basis test, and the Petitioners parental rights claim must be rejected.

II. STUDENTS' LIBERTY INTERESTS DO NOT RENDER THE SERVICE LEARNING PROGRAM UNCONSTITUTIONAL.

Petitioners' claim that the Service Learning Program invades that very limited set of core personal choices recognized under the "liberty" component of substantive

due process analysis as requiring "strict scrutiny." *See generally, Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. at 2806-07. The lower court held that "there is no basis to find that the students' due process rights should be examined any differently than those of their parents." *Herndon*, 899 F. Supp. at 1453. *See*, Pet. Writ. A-41.

Substantive due process does not protect every choice an individual might seek to make. Rather, the Court has applied strict scrutiny only to claims involving a discrete set of "a person's most basic decisions." *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2806 (1992). The Court has described in plain terms the narrow scope of personal decisions that are protected under this doctrine. *Id.* at 2807; *see also Whalen v. Roe*, 429 U.S. 489, 600 & n.26 (1977). The decision whether and how to serve others nowhere appears on this list. To our knowledge, no judicial decision has ever identified this decision as one that is so "basic" to personhood that it must be protected under a compelling interest standard against the actions of duly elected State officials.

Petitioners maintain that there is a "long-established common law principle" prohibiting State-required community service. Community service, however, was central to two institutions dear to the Framers of the Constitution, to wit: military service and jury duty. *See, e.g.* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 29 U.C. Davis. L. Rev. 1169, 1170 (1995) ("the 'militia' and the 'jury' were twin duties of good citizenship") Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162-73, 1181-95 (1991) (discussing the role of the conscripted militia and the citizen jury in the

Framers' constitution). Moreover, both English and early American communities required people to serve the community by constructing public roads. *Butler v. Perry*, 240 U.S. 328, 331 (1916), ("[f]rom Colonial days to the present time" citizens have been asked to help construct and maintain the community's roads) (citation omitted). The well-documented history of required community service in militias, on juries and building roads conclusively demonstrates that no traditional "ban" on state-required community service has ever existed.

It especially should not apply in the school context. Petitioners continually portray service learning as requiring students to work. They neglect that the Service Learning Program, even more than the militia, jury and road building duty the Framers' found acceptable, is an educational vehicle designed to impart important skills for citizenship, learning and employment. The Court recently emphasized that the scope of the rights the Constitution affords schoolchildren is limited to "what is appropriate for children in a school" and that "Fourteenth Amendment rights . . . are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, ___ U.S. ___, 115 S. Ct. 2386, 2392 (1995); *see also, Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995); *Doe v. Superintendent of Sch.*, 653 N.E.2d 1088, 1097 (Mass. 1995). It would be especially inappropriate for a court to recognize a new substantive due process right as a protection against a duly elected school board's curricular requirement.

CONCLUSION

Local elected officials and educators of The Chapel Hill-Carrboro City Schools has decided to use service learning to foster the qualities of good citizenship, successful learning and successful employment. The present action asks the Court to engage in expansive constitutional interpretations that are at odds with the controlling case law in order to call a halt to this educational practice. United States District Judge Bullock properly rejected this invitation, stating

> it is not up to the federal courts to determine who should teach, what to teach and how it should be taught. The Chapel Hill-Carrboro City Board of Education is made up of duly-elected officials who have discretion in establishing a curriculum for Chapel Hill High School. Plaintiffs retain the right to seek change by supporting, along with their neighbors, school board candidates who would cancel or revise the community service program.

Pet. Writ A. 47.

For the foregoing reasons, certiorari should be denied and United States District Judge Bullock's Order, granting, in its entirety, Respondents' (Defendants') motion for summary judgment, as affirmed by the United

States Court of Appeals for the Fourth Circuit, should be allowed to stand.

Respectfully submitted,

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